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DERICHSWEILER, MARK

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,

Plaintiff,

vs.

CASE NO. 05-CV-00329-GKF SAJ

TYSON FOODS, INC., et al.,

Defendants.

VIDEOTAPED DEPOSITION OF MARK DERICHSWEILER  
VOLUME II  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON JUNE 6, 2008, BEGINNING AT 8:30 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

REPORTED BY: Laura L. Robertson, CSR, RPR

**EXHIBIT 1**

1 Q. And they, or the AG's office or CDM, or  
2 both, didn't believe that the data that was being  
3 collected by CDM was consistent with the work of Dr.  
4 Storm? I'm not trying to misstate it, if I have  
5 stated it incorrectly, correct me.

6 A. Generally there was concern that the model  
7 that Dr. Storm had developed did not accurately  
8 account for or predict -- I mean models are predictive  
9 tools that the data that they had collected conflicted  
10 with some of the results of Dr. Storm's model.

11 Q. What was the conflict?

12 A. Generally the concern was that -- well, I  
13 don't know how far back to go to try and explain this  
14 for everybody.

15 Q. Just do your best.

16 A. The model simulates what happens in the  
17 watershed. The driving factors in all of these models  
18 is weather conditions, rainfall, stream flow. So the  
19 model simulates what washes off of the land into the  
20 stream when it rains and also what is happening in  
21 other times when there is not rainfall, that's called  
22 base-flow conditions.

23 When there is not run off, that's base-flow  
24 in the stream. There was concern that the model that  
25 Dr. Storm developed was not accurately predicting the

1 base-flow phosphorous concentrations in the stream.

2 Q. It was under predicting the amount of  
3 phosphorous or over predicting it?

4 A. It was under predicting phosphorous under  
5 base-flow conditions, because the model had been set  
6 up to -- did not account for non-point source  
7 contributions. Non-point sources are generally what  
8 is washed off of the land under a run off event that  
9 the model did not account for non-point source  
10 contributions of phosphorous under base-flow  
11 conditions.

12 Their data indicated that there was a  
13 significant phosphorous load that entered the streams  
14 under base-flow conditions due to the karst geology,  
15 the nature of the geology in the area. There is a  
16 significant groundwater input to the streams.

17 Their data indicated that due to the  
18 phosphorous content in the soils, litter application  
19 in the watershed, that that phosphorous was being  
20 transported to the streams under base-flow conditions  
21 as well as during run off events, and that that was  
22 not reflected in Dr. Storm's model.

23 Q. If I'm understanding you correctly, Dr.  
24 Storm's model was suggesting that there was no  
25 phosphorous runoff in base-flow conditions?

1 is involved in a lawsuit. You were aware of that;  
2 correct?

3 A. I don't remember when the suit was filed --  
4 if it had been filed at that point or if there were  
5 still settlement negotiations going on.

6 Q. It had been filed. I will represent to you  
7 that it had been filed.

8 A. I knew there was -- yes.

9 Q. Okay.

10 MR. NANCE: We would stipulate to that.

11 MR. RYAN: It is a matter of public record.

12 Q. (BY MR. RYAN) All right. Okay. Was there a  
13 general concern as you understood it by the AG's  
14 office or the Secretary of Environment that they  
15 didn't want Dr. Strong to be going out there making  
16 predictions that would be inconsistent with  
17 allegations being made in a lawsuit?

18 A. The concern was that we wanted to get the  
19 model correctly constructed. I mean, models are a  
20 representation of the real world, and you want them to  
21 work as well as possible in simulating what goes on in  
22 the real world and predicting what happens in the real  
23 world.

24 So our interest was in getting the model as  
25 good as it could be to accurately simulate or predict

1 what is happening in the streams.

2 Q. Well, you have been with -- in water quality  
3 work for 30 years or so; right?

4 A. Yes.

5 Q. And on any prior occasion has the Attorney  
6 General's office ever come in and tried to influence a  
7 TMDL decision or TMDL work that was undergone by the  
8 Department of Environmental Quality?

9 MR. NANCE: Object to the form. Go ahead  
10 and answer.

11 THE WITNESS: I wouldn't characterize the  
12 Attorney General's office involvement as interfering.

13 Q. (BY MR. RYAN) Well, I'm just trying to find  
14 out, at any prior time had you had any involvement  
15 with the AG's office involving a TMDL other than what  
16 we have just spoken of?

17 A. We did not have any in-depth meetings, but  
18 the Attorney General's office was aware of the Tetra  
19 Tech work.

20 Q. In the IRW?

21 A. Yes.

22 Q. All right. Any other times other than the  
23 Tetra Tech work in the IRW and Dr. Strong's work in  
24 the IRW that you're aware of, or the AG's office had  
25 become involved, either through discussions or

1 hopefully when they are attained that the water  
2 quality standards would be met, yes.

3 Q. Now, I didn't understand -- I didn't  
4 appreciate that until just now that you didn't have  
5 any enforcement.

6 So if you make -- ODEQ comes to the  
7 conclusion at the end of the TMDL study that -- well,  
8 you do have enforcement in a sense on point sources;  
9 correct?

10 A. Yes, the ones that we regulate.

11 Q. Because you can change their permit or  
12 modify their permit?

13 A. Right, and there is a requirement in the  
14 federal rules that NPDES permits must be in  
15 conformance with an approved TMDL.

16 Q. And so when you're talking about not having  
17 enforcement, are you talking about non-point sources  
18 or unregulated point sources?

19 A. Anything that we don't have authority for.

20 Q. Okay.

21 A. Which would include both of those.

22 Q. So have you had this come up in the past  
23 where you did a TMDL, and you had allocated a certain  
24 percentage to say, a non-point source or an  
25 unregulated point source, a non-point source, and you

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1 said, look, we need you to cut back 25 percent and  
2 they refused to do it?

3 A. We are going outside the Illinois River  
4 Watershed here.

5 Q. Yes, but I'm just trying to understand how  
6 this mechanism works.

7 A. I just added that to make sure you  
8 understand.

9 Q. That's fair.

10 A. The only ones we have really done within the  
11 watershed are for those individual point sources which  
12 were -- resulted in a change to their permit.

13 Q. Right.

14 A. The one example I can give you, the Fort  
15 Cobb watershed TMDL, Lake Fort Cobb that we did which  
16 was for phosphorous. There are no point sources in  
17 that watershed. We did do load allocations among the  
18 various non-point sources.

19 We have no authority to ensure that those  
20 are achieved. We have no authority to direct farmers  
21 to convert crop lands to forest land or pasture land  
22 or any of the other possible alternatives that were  
23 discussed in the report.

24 Q. And did people refuse to comply, or do you  
25 know?

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1 the Illinois River Watershed, do I understand  
2 correctly that the DEQ has authority to persuade  
3 rather than to compel reductions in point source  
4 loading?

5 MR. MCDANIEL: Objection, leading.

6 Q. (BY MR. NANCE) Go ahead.

7 A. For point sources, we do have authority to  
8 compel their compliance with the requirements of the  
9 TMDL.

10 Q. Okay. For non-point sources do you have  
11 authority to compel reductions?

12 A. We do not have any regulatory authority for  
13 non-point sources.

14 Q. Okay. Does the DEQ or the state of Oklahoma  
15 generally have the authority to compel reduction in  
16 point source loading as a result of a TMDL, if the  
17 point sources are in the state of Arkansas?

18 A. We have no authority in the state of  
19 Arkansas, that I'm aware of.

20 Q. Does the existence of an ongoing TMDL  
21 process rule out the filing by the state of Oklahoma  
22 of a lawsuit to stop pollution in the watershed?

23 MR. MCDANIEL: Object to the form. Calls  
24 for a legal conclusion.

25 THE WITNESS: I don't believe so.